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October Term 2001

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY TRIOLA
Petitioner
V.
DANNY VIERA,
Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT SANCTIONED THE DISTRICT COURT'S SUBSTANTIAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION WHERE THE DISTRICT COURT IMPROPERLY IMPOSED UPON PETITIONER THE PRISON LITIGATION REFORM ACT'S EXHAUSTION OF REMEDIES REQUIREMENT AND EFFECTIVELY QUASHED FOREVER PETITIONER'S 42 U.S.C. §1983 CLAIM FOR DAMAGES ARISING FROM PETITIONER'S ALLEGED EXCESSIVE USE OF FORCE?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
ARGUMENT	8
CONCLUSION	15
APPENDIX:	
Order of U.S. Court of Appeals Third Circuit dated July 24, 2001	1a
Order of U.S. District Court Middle District of Pennsylvania, dated July 13, 2000	2a
42 U.S.C. §1983	11a
42 U.S.C. §1997(e) (a)	12a
Monroe County Correctional Facility Grievance Procedure	12a
Memorandum Opinion of U.S. Court of Appeals Third Circuit dated 7/24/01	14a

TABLE OF CITATIONS

	PAGE
Booth v. Churner, C.O., 206 F.3d 289 (3d Cir. 2000).....	12,13
Booth v. Churner,, 532, U.S. ___ 121 S.Ct. ___ (2000).....	9
Nyhuis v.Reno, 204 F.3d 65 (3d Cir. 2000)	12,14

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Timothy Triola, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 24, 2001.

OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals for the Third Circuit rendered July 24, 2001 is unrecorded and appears at Appendix Page 1a herein.

The Order and Opinion of the United States District Court for the Middle District of Pennsylvania rendered July 13, 2000 is unrecorded and appears at Appendix Page 3a-11a herein.

JURISDICTION

The final Order of the Court of Appeals For the Third Circuit is dated July 24, 2001. This petition for writ of certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(3) and Rule 10(a) of this Honorable Court. The jurisdiction of the Court of appeals was based upon 28 U.S.C. §1291.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. §1983 See Appendix Page 11a

42 U.S.C. 1997(e) See Appendix Page 12a-13a

STATEMENT OF THE CASE

a. Procedural History

On September 30, 1999, Petitioner, Timothy Triola, filed a 42 U.S.C. §1983 Complaint against Defendant, correctional officer, seeking damages arising from Defendant's alleged excessive use of force. The United States District Court had jurisdiction over this matter pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331 and the First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. On or about May 10, 2000, Defendant, Viera, filed a motion for summary judgment. On July 13, 2000, the United States District Court for the Middle District of Pennsylvania granted Defendant's motion, concluding that Plaintiff failed to exhaust his administrative remedies under 42 U.S.C. §1997e(a).

Although the District Court dismissed Plaintiff's Complaint without prejudice, the Order effectively put Plaintiff's claim out of court forever. Theoretically, the District Court's dismissal without prejudice would allow Mr. Triola the opportunity to complete Monroe County Correctional Facility's Grievance Procedure to the extent the court found such a failure. As a practical matter, prior to the time the District Court considered Defendant's motion for summary judgment, Plaintiff had been moved to a different facility. No longer being in

Monroe County's facility, he could not avail himself of that grievance procedure. The order thus effectively made Plaintiff unable to exhaust administrative procedures which the court concluded he failed to do.

Plaintiff timely appealed to the Court of Appeals for the Third Circuit which affirmed the District Court on July 24, 2001. Plaintiff respectfully submits his petition for writ of certiorari which is now before this Honorable Court for disposition.

b. **Statement of Facts**

On July 8, 1998, Plaintiff was incarcerated in the Monroe County Correction Facility. Defendant, Viera, was employed as a guard at the Monroe County Corrections Facility on that day.

During a contraband search of the inmates' cells, Defendant discovered an extra towel in Plaintiff's cell. Defendant had the discretion to discipline Plaintiff for this violation. The appropriate discipline for having four towels in his cell instead of three, with either: (a) a verbal warning; or (b) a 24-hour lock down. Defendant chose to discipline Plaintiff by giving Plaintiff a 24-hour lock down. Plaintiff was locked down in his cell until Defendant returned to his cell, grabbed

Plaintiff by the neck and hair, slammed Plaintiff into a door, and then slammed Plaintiff's head into the floor repeatedly.

The Pennsylvania State Police were notified about this beating. Trooper Robert Sebastianelli of the Pennsylvania State Police was assigned to investigate Plaintiff's complaints. Trooper Sebastianelli interviewed Plaintiff as well as other corrections officers as part of his investigation. Trooper Sebastianelli noticed a red mark and a small amount of bruising on Plaintiff's forehead, and abrasions on his right wrist. Trooper Sebastianelli took photographs of Plaintiff's injuries as part of his investigation, but these photos were destroyed by Sebastianelli and are now unavailable.

Defendant claims that, during the altercation between Defendant and Plaintiff, Plaintiff was trying to break away from him. Defendant then yanked Plaintiff to the ground by Plaintiff's hair. Defendant also testified that only Plaintiff's knees and elbows touched the ground as a result of this takedown. Plaintiff was in handcuffs for the entire incident.

As a result of his investigation, Trooper Sebastianelli concluded that there was an incident between Plaintiff and Defendant, but Trooper Sebastianelli did not believe that Defendant

intentionally assaulted Plaintiff. Plaintiff was never notified that he had the ability to appeal Trooper Sebastianelli's determination. In fact, there is no evidence to suggest that Plaintiff was informed of Trooper Sebastianelli's conclusion or the outcome of the investigation prior to this litigation.

On July 9, 1998, the Monroe County District Attorney asked to have Plaintiff removed from an "intermediate punishment" program because: 1) Plaintiff has been incarcerated on numerous counts of burglary and related offenses; and 2) Plaintiff has been a discipline problem in prison. There is o suggestion from the District Attorney's Office that this "discipline problem" related to Plaintiff assaulting Defendant. In fact, the secondary charge in the District Attorney's petition might have related to Plaintiff's having an extra towel in his cell, or the use of "insulting language" Plaintiff's intermediate punishment was revoked on July 23, 1998. However, in doing so, Judge Vican did not find that Plaintiff had assaulted, injured or battered Defendant. In fact, Defendant has not claimed that he was injured or attacked by Plaintiff.

On July 15, 1998, in an administrative hearing, Plaintiff was found guilty of "insulting language" and "insolence". ("Due To C/O Viera's report on Triola's verbal abuse and no witnesses to refute such the board found him guilty"). There was no allegation at this administrative hearing that Plaintiff harmed or offensively touched Defendant

It is on these disputed facts that Defendant sought summary judgment. The District Court granted Defendant's motion concluding that Plaintiff failed to exhaust administrative remedies pursuant to the Prison Litigation Reform Act, 42 U.S.C. §1997e(a). Plaintiff now petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit which affirmed the District Court Order.

REASONS FOR GRANTING THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 10(a) of the Rules of the United States Supreme Court in that a United States Court of Appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power.

ARGUMENT

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT SANCTIONED THE DISTRICT COURT'S SUBSTANTIAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION WHERE THE DISTRICT COURT IMPROPERLY IMPOSED UPON PETITIONER THE PRISON LITIGATION REFORM ACT'S EXHAUSTION OF REMEDIES REQUIREMENT AND EFFECTIVELY QUASHED FOREVER PETITIONER'S 42 U.S.C. §1983 CLAIM FOR DAMAGES ARISING FROM PETITIONER'S ALLEGED EXCESSIVE USE OF FORCE?

The Prison Litigation Reform Act requires that a prisoner exhaust available administrative remedies prior to filing an action under 42 U.S.C. §1983, 42 U.S.C. §1997e(a). The District Court dismissed Mr. Triola's 42 U.S.C. §1983 claim for failure to exhaust administrative remedies under the Prison Litigation Reform Act {PLRA} 42 U.S.C. §1997e(a). The United States Court of Appeals for the Third Circuit affirmed the dismissal. On May 29, 2001, the United States Supreme Court, resolving a conflict among circuit courts held that the PLRA's exhaustion requirement applies even if the administrative procedure does not provide the specific relief sought.

The district court erred as a matter of law in applying *Booth v. Churner C.O. infra*, to this case. Mr. Triola's §1983 claim should not have been governed by PLRA. Moreover, even if the Act does apply, Mr. Triola complied. Hence, Mr. Triola respectfully submits this petition for a writ of certiorari.

1. Under the PLRA, exhaustion is not required where the administrative procedure lacks authority to provide any relief or to take any action in response to a complaint. *Booth infra.* Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust. *Booth v. Churner,* 532 U.S. ___ 121 S.Ct. ___ (2001). footnote 4. The United States Supreme Court noted that the exhaustion requirement of the Prison Litigation Reform Act 42 U.S.C. §1997e(a) would not apply in such a case. *id.*

2. The grievance procedure at bar does not provide for any relief or grant any authority to take any action in response to a complaint. The Monroe County Correctional Facility Grievance Procedure provides:

> "If you feel that someone or some action that has been taken against you is unjust or unfair, you may file a grievance. A grievance

includes at least one level of appeal. It is encouraged that problems solving begin at the level of most direct inmate contact. You should utilize the grievance procedure, only after addressing the problem with the Housing Unit Officer and reaching no satisfaction to the problem which you feel there is reason for complaint. You should fill out an inmate request slip, checking the box marked grievance and filling in the space provided with a short explanation of the problem. This completed form should be forwarded to the Housing Unit Counselor.

The Housing Unit Counselor will handle the grievance for forward to the appropriate Unit Commander at the next level.
The Unit Commander will try to settle the grievance at this level and provide a written response to you or forward to the appropriate person(s) at the next level.

The appropriate Deputy Warden will try to settle the grievance at this level and provide a written response to you or forward to the Warden.

> The Warden will review previous responses and try to settle the grievance at this level and provide a written response to you. The Warden is the final step in the grievance procedure."

No provision exists concerning the possibility of some relief. No provision grants administrative officers authority to act on a complaint for excessive use of force or other abuse. The grievance procedure merely states that officers "will try to settle" the grievance. Without the possibility of some relief, the officers presumably have no authority to act on the subject of the complaint. *Id*. Mr. Triola thus is left with nothing to exhaust. Hence, the Prison Litigation Reform Act's exhaustion requirement does not apply in this case.

3. Even assuming *arguendo* that the §1997e(a) exhaustion requirement applies to Mr. Triola's claim, the District Court erred as a matter of law in its application to the facts in this case. Mr. Triola did satisfy the purpose and intent of the PLRA exhaustion requirement. Hence, Mr. Triola seeks review by this Honorable Court.

The District Court relied upon the reasoning of *Nyhuis v. Reno*, *infra*, which explained that the purpose of the exhaustion and available remedies requirement is to promote judicial efficiency i.e., to

establish a record, investigate the claims and narrow the issues to avoid wasting judicial resources).

When *Booth*, was before the United States Court of Appeals for the Third Circuit see, *Booth v. Churner C.O.* 206 F.3d 289 (3d Cir. 2000), that court relied upon the fact that the administrative process can help create a record to distinguish between meritorious and frivolous prison claims. (citing *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000). Due to the fact that Booth failed to exhaust administrative remedies and wholly failed to create a record, Booth contravened the intention of the PLRA. Accordingly, the Third Circuit upheld the dismissal of Booth's complaint for failure to exhaust administrative remedies.

In contrast to the Booth plaintiff, Timothy Triola initiated an investigation and interview and created a record and complied with the PLRA's intention. According to policies at the Monroe County Prison, Plaintiff need only file a grievance. App. p. ____. Mr. Triola did report the incident to the Pennsylvania State police and cooperated with Trooper Sebastanielli. Significantly, Trooper Sebastianellis' investigation did generate a report and records—one of the concerns raised by the Third Circuit in *Booth*, *supra*.. In fact, Trooper Sebastianelli destroyed the photographs taken of Plaintiff's injuries, that were a part of this record.

Another significant difference between this case and the facts of *Booth* is that Booth was incarcerated at a State Correctional Institution which had a detailed and specific grievance policy. See, *Booth v. Churner*, 206 F.3d 289, 292-93 n. 2 (3d Cir. 2000). Monroe County Jail's policy ("It is encouraged that problem solving begin at the level of most direct inmate contact") App p ___, contains no level of detail concerning procedure. Due to the informal nature of Monroe County's administrative grievance procedure, Plaintiff's conduct in reporting the excessive force used against him by Defendant Viera to the State Police satisfied any reporting requirement.

As Defendant noted in his brief to the District Court, State Trooper Sebastianelli was summoned to the jail to interview the parties and conducted an investigation. "Trooper Sebastianelli prepared a written incident report detailing his investigation and the statements of witnesses he interviewed."

The court in *Booth* explained that the grievance procedures provided there were for the purpose of allowing an investigation into the grievance and permitting persons with personal knowledge of the subject matter to be interviewed. Also, Booth stated that if the grievant requests a personal interview, an interview should be allowed.

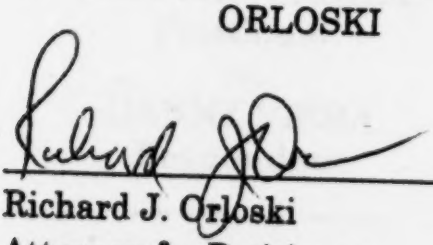
Discussing the PLRA's intention, the Third Circuit noted in *Nyhuis v. Reno*, the administrative process can serve to create a record for subsequent proceedings, it can be used to help focus and clarify poorly pled or confusing claims, and it forces the prison to justify or explain its internal procedures. 204 F.3d 65 (3d Cir. 2000). Here, Triola complied with the intention and purpose of the exhaustion of remedies requirement. Hence, the order affirming the exhaustion of dismissal by Plaintiff's §1983 claim ought to be reversed.

4. The order dismissing Plaintiff's §1983 claim without any possibility that he could exhaust administrative remedies denies Mr. Triola any opportunity to pursue his claims for excessive use of force. Having dismissed Plaintiff's claim for failure to exhaust administrative remedies, the District Court did not reach the merits of Plaintiff's §1983 claim. The district court had knowledge that Mr. Triola was no longer residing at and could not pursue the required administrative remedies at Monroe County Correctional facility. The record before this Honorable Court reflects a significant dispute over the altercation leading to Timothy Triola's injuries on July 8, 1998. It is axiomatic that genuine issues of material fact preclude summary judgment. Hence, the order granting Defendant's motion for summary judgment ought to be reversed. Timothy Triola thus seeks review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition For A Writ of Certiorari ought to be granted.

ORLOSKI, HINGA, PANDALEON & ORLOSKI



Richard J. Orloski
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2314

TIMOTHY TRIOLA,
Petitioner
vs.
DANNY VIERA
Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(Dist. Court No. 3:CV-99-001743)
District Court Judge: James M. Munley

Submitted Under Third Circuit LAR 34.1(a)
March 13, 2001

Before ALITO and RENDELL, Circuit Judges
and SCHWARZER District Judge
The Honorable William W. Schwarzer,
United States District Judge for the Northern
District of California, sitting by designation.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit. LAR 34.1(a) on March 13, 2001.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court entered on July 13, 2000, which dismissed the complaint without prejudice, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court. Costs taxed against appellant.

ATTEST:
Chief Deputy Clerk
Dated July 24, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TIMOTHY TRIOLA	:	**NO. 3:CV-99-01743**
Plaintiff	:	
	:	**(Judge Munley)**
vs.	:	
DANNY VIERA,	:	
Defendant	:	

ORDER

AND NOW, to wit, this 13th day of July 2000, it is hereby **ORDERED** as follows: 1) Defendant's motion for summary judgment [12-1] is hereby **GRANTED** for plaintiff's failure to exhaust administrative remedies pursuant to 42 U.S.C. §1998e(a), and the dismissal of the complaint is without prejudice. 2) The Clerk of Curt is directed to close this case.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TIMOTHY TRIOLA	:	**NO. 3:CV-99-01743**
Plaintiff	:	
	:	**(Judge Munley)**
vs.	:	
DANNY VIERA,	:	
Defendant	:	

MEMORANDUM

Before the court for disposition is the Defendant's motion for summary judgment under Federal Rule of Civil Procedure 56. The plaintiff in this case is Timothy Triola, formerly an inmate at the Monroe County Correctional Facility (MCCF"), and the defendant is Danny Viera, a correctional officer at the MCCF. This matter has been briefed and is ripe for disposition.

Background

On July 8, 1998, plaintiff at that time an inmate at the MCCF, was found to be in possession of contraband, discovered by the defendant during a random search of prison cells. Defendant had found an extra towel in plaintiff's cell, a violation of MCCF's rules thereby subjecting plaintiff to prison discipline. Viera Deposition at 58. The MCCF gives the correctional officer the discretion to punish an inmate for contraband by either issuing a verbal warning or a

24-hour lock down. *Id.* The Defendant opted to issue the plaintiff a 24-hour lock down as punishment. *Id.* During this lock down period, defendant claims that plaintiff became loud and disruptive, using threatening and obscene language. *Id.* at 62. Plaintiff denies this allegation.

As a result of plaintiff's supposed loud and disruptive behavior, the correctional officers made a decision to remove him from the unit. *Id.* The subject of this suit is an incident, alleged to have occurred between defendant and plaintiff during plaintiff's removal from the unit. Plaintiff claims that Viera grabbed him by the neck and hair, slammed him into the door, and then slammed his head repeatedly into the pavement. Triola Deposition at 54. Viera asserts that plaintiff resisted during transfer and that it was necessary to subdue him by grabbing his hair and forcing him to the ground. Viera Deposition at 76. After the incident, Plaintiff was examined by a nurse at the prison, and her report indicated that he suffered from only superficial abrasions. See Nurse's report.

Later that day, July 8, 1998, plaintiff telephoned his mother and told her about the incident. Plaintiff's mother called the state police. Triola Deposition at 41. The incident was investigated on July 9, 1998 by Trooper Robert Sebastianelli, who determined that the charges against Officer Viera were unfounded. See Defendant's Exhibit B, State Police Incident Report.

Sebastianelli concluded that Mr. Triola had not been assaulted and that any force Officer Viera used was necessary to control an inmate who was combative. *Id.* In his incident report, Trooper Sebastianelli noted that the plaintiff's injuries consisted only of minor bruises and abrasions. *Id.*

A disciplinary hearing was held during which Triola was found guilty of verbally abusing a correctional officer. See Defendant's Exhibit F, MCCF Disciplinary Board Action. It is apparently uncontested that plaintiff failed to appeal this decision, failed to file a grievance against the defendant, or pursue any of the administrative remedies available to him. See Statement of Undisputed Facts, at 11. Plaintiff has not sought any further medical treatment for the injuries he claims he suffered and continues to suffer as a result of the incident with Officer Viera. Triola Deposition, at 64.

Plaintiff has brought this action against the defendant alleging that defendant used excessive force in violation of his civil rights under 42 U.S.C. §1997e(a).[1]

---

[1] While other issues have been raised in the defendant's motion we will only address the failure to exhaust administrative remedies as we find it to be dispositive.

Standard of Review

The law provides that summary judgment shall be granted where "...the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.C.Pro. 56 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Brooks v. Kyler*, 204 F.3d 02, 105 (3d Cir. 2000). A summary judgment motion cannot be granted where a dispute about a material fact is genuine, "that is, if the evidence such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 , 1986; *Todist v. CIGNA Corp.*, 206 F.3d 303, 304 (3d Cir.2000).

Summary judgment must be granted pursuant to Rule 56 where after an adequate time for discovery a party "fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex* at 477 U.S. at 322. In deciding a motion for summary judgment, we must view the facts in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 249-50.

Discussion

Lawsuits brought by prisoners are governed by 42 U.S.C. §1997e. Subsection (a) of this statute provides: "No action shall be brought with respect to prison conditions under section 1983 of this title... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. §1997e(a). Excessive force is considered a prison condition for purposes of the Prison Litigation Reform Act of 1996 (PLRA), and in such an instance a prisoner must first exhaust administrative remedies before bringing a section 1983 action alleging prison guards' intentional acts of violence. See e.g. *Booth v. Churner, C.O.*, 206 F.3d 289, 291 (3d Cir. 2000).

The Third Circuit has recently examined and justified the mandatory administrative exhaustion requirement in section 1997e. As noted in *Nyhuis v. Reno*, "[t]he administrative process can serve to create a record for subsequent proceedings, it can be used to help focus and clarify poorly pled or confusing claims, and it forces the prison to justify and explain its internal procedures." 204 F.3d 65, 76 (3d Cir. 2000). An across the board exhaustion requirement promotes judicial efficiency by enabling district courts to distinguish better between meritorious and frivolous claims made by prisoners, thereby affording them ore time to address the serious concerns raised by meritorious claims. *Booth*

206 F.3d at 293. "..[T]he PLRA amended section 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory—whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." *Nyhuis* 204 F.3d at 67. Therefore, because there were administrative procedures in place at MCCF, plaintiff's section 1983 claim for excessive use of force is subject to the mandatory exhaustion requirement in section 1997e.

The MCCF Inmate Handbook includes an inmate grievance procedure. See Defendant's Exhibit F, at 14. It has been held that such grievance procedures serve as an administrative remedy which must be exhausted prior to filing suit. *Booth* 2066 F.3d at 291. While the MCCF grievance procedure is not as detailed as the one reviewed by the Third Circuit in *Booth*, 206 F.3d at 293, it nevertheless sets forth a specific procedure for filing and appealing grievances. The only action taken by Mr. Triola to report Officer Viera's alleged use of excessive force was his statement to Trooper Sebastianelli during the State Police investigation of the alleged incident.

Plaintiff argues that MCCF's grievance policy is vague and informal and that his report to the State Police complied with and exhausted the available administrative remedies. We disagree. While the MCCF policy encourages an informal resolution of problems within each housing unit,

thereafter the policy sets forth a procedure for filing of inmate grievances. Defendant's Exhibit F, at 14. Reporting an incident to the State Police does not constitute compliance with the administrative procedures listed in the Inmate Handbook. Accordingly, plaintiff's failure to pursue an and exhaust the administrative remedies available to him at the MCCF, bars his claim from being heard by this court. Triola Deposition at 74.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment will be granted. An appropriate order follows.[2]

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[2] The defendant urges this court to dismiss plaintiff's claim with prejudice because plaintiff is no longer an inmate at the MCCF and thus, cannot proceed with a grievance there. However, no authority has been cited that supports defendant's contention that plaintiff cannot cure the procedural defects of his claim by filing a grievance through MCCF's established administrative procedures despite his transfer to another prison. Accordingly, plaintiff's claim will be dismissed without prejudice.

§1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected , any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act, or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§1997e(a) Exhaustion of Remedies

(a) (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as any available.

(2) The exhaustion of administrative remedies under paragraph)1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

GRIEVANCE PROCEDURE

If you feel that someone or some action that has been taken against you is unjust or unfair, you may file a grievance. A grievance includes at least one level of appeal. It is encouraged that problem solving begin at the level of most direct inmate contact. You should utilize the grievance procedure,

only after addressing the problem with the Housing Unit Officer and reaching no satisfaction to the problem which you feel there is a reason for complaint. You should fill out an inmate request slip, checking the box marked grievance and filling in the space provided with a short explanation of the problem. This completed form should be forwarded to the Housing Unit Counselor.

The Housing Unit Counselor will handle the grievance or forward to the appropriate Unit Commander at the next level. The Unit Commander will try to settle the grievance at this level and provide a written response to you or forward to the appropriate person(s) at the next level.

The appropriate Deputy Warden will try to settle the grievance at this level and provide a written response to you or forward it to the Warden.

The Warden will review previous responses and try to settle the grievance at this level and provide a written response to you. The Warden is the final step in the grievance procedure.

UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2314

TIMOTHY TRIOLA,
Appellant

v.

DANNY VIERA

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA

(Dist. Court No. 3:CV-99-01743)
District Court Judge; James M. Munley

Submitted Under Third Circuit LAR 34.1(a)
March 13, 2001

Before: ALITO and RENDELL, Circuit Judges, and
SCHWARZER* District Judge.

(Filed July 24, 2001)

MEMORANDUM OPINION OF THE COURT

ALITO, Circuit Judge:

Timothy Triola sued correctional officer Daniel Viera for damages under 42 U.S.C. §1983, alleging that Viera used excessive force on Triola while Triola was incarcerated at the Monroe County Correctional Facility ("MCCF"). The District Court dismissed Triola's complaint without prejudice, finding that Triola had failed to exhaust his administrative remedies as required by 42 U.S.C. §1997e(a). Triola appealed.

In Booth v. Churner, 206 F.3d 289, 291 (3d Cir. 2000), this Court held "that §1997e(a) applies to excessive force actions." In Booth, we likewise held that §1997e(a) requires exhaustion even if the administrative process could not provide the money damages sought. Id. While Triola's appeal was pending, the Supreme Court affirmed the judgment in Booth, holding that §1997e(a) requires exhaustion of remedies when the administrative process can provide some relief, albeit not the relief the prisoner seeks. Booth v. Churner, 121 S. Ct. 1819 (2001). The MCCF provides a grievance procedure which Triola could have invoked prior to initiating this litigation. Because Triola failed to exhaust this administrative process, the District Court properly

dismissed Triola's complaint. The order of the District Court dismissing the Complaint without prejudice is therefore affirmed.

TO THE CLERK OF COURT:

Kindly file the foregoing Memorandum Opinion.

/S/ Samuel A. Alito, Jr.
Circuit Judge

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.